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Supreme Court, U.S.
FILED

No. _____

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In the

# Supreme Court of the United States

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STEPHEN DALE MCCLELLAN,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Fourth Circuit

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Whether, under advisory sentencing guidelines, a district court violates a defendant's Sixth Amendment rights when it uses a judge found fact as the only basis for increasing a defendant's sentence?

II. Whether a court of appeals exceeds its authority by directing the imposition of sentence based solely on the judge found fact.

III. Whether the decision should be summarily reversed for reconsideration in light of this court's holding in *Gall v. United States*, 128 S. Ct. 586 (2007).

## LIST OF PARTIES TO THE PROCEEDING BELOW

The parties in the court below are contained in the caption. There is no party with an interest to disclose pursuant to Rule 29 (6).

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Petitioner, Stephen Dale McClellan, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit in this case rendered on December 10, 2007.

## OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is found at 2007 WL 4302455 (4th Cir. December 10, 2007). The opinion is reproduced in the Appendix to this petition. Pet. App. 1-5.

## JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit vacating and remanding the district court's sentence was entered on December 10, 2007. The question of whether, under advisory guidelines, the use of judge-found facts to increase sentence violated the Sixth Amendment was presented to the Fourth Circuit. This petition for a writ of certiorari is timely filed within ninety days of the Fourth Circuit's ruling. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The applicable constitutional provision is Amendment VI to the United States Constitution, which provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ..." US. Const. Amend. VI.

The statutes involved are:

18 U.S.C. § 3553. Imposition of a sentence

(a) **Factors to be considered in imposing a sentence.**—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) **Application of guidelines in imposing a sentence.**--

(1) **In general.**--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

18 U.S.C. § 3742.

(e) Consideration.--Upon review of the record, the court of appeals shall determine whether the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that--

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the

findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

## STATEMENT OF THE CASE

Stephen Dale McClellan was indicted by the grand jury for the Western District of North Carolina on August 2, 2004, and charged, along with six codefendants, with conspiracy to possess with intent to distribute more than 1.5 kilograms of methamphetamine mixture. Mr. McClellan pleaded not guilty and his case was tried before a jury beginning on January 4, 2005. The jury returned a verdict of guilty the following day. In a special verdict, the jury found that the conspiracy involved at least 1.5 kilograms of a methamphetamine mixture but that Mr. McClellan did not know and could not have reasonably foreseen the involvement of at least 1.5 kilograms of methamphetamine. The jury was not asked whether Mr. McClellan knew or could have reasonably foreseen the involvement of any amount less than 1.5 kilograms. Pet. App. 33-34.

The district court sentenced Mr. McClellan on August 31, 2005. During the sentencing hearing, Mr. McClellan argued that the quantity of methamphetamine attributable to him was 20 grams, the amount he admitted at trial he had possessed. He further argued that the determination

of individual responsibility in the context of a drug conspiracy had to be made by a jury beyond a reasonable doubt in order to comport with a defendant's Sixth Amendment right to a jury trial. In response, the government detailed particular testimony and contended that Mr. McClellan was responsible for in excess of 500 grams of methamphetamine.[1] The court determined that in light of the jury's special verdict, it could only sentence Mr. McClellan based on the twenty grams of methamphetamine he had admitted to possessing. The court then found that Mr. McClellan's base offense level was 20, with a corresponding sentencing range of 33 to 41 months imprisonment, and sentenced Mr. McClellan to 36 months imprisonment. Pet. App. 33-34.

The government gave notice of appeal and, on May 25, 2006, the United States Court of Appeals for the Fourth Circuit reversed. The Fourth Circuit held that the district court erred as a matter of law in failing to calculate Mr. McClellan's sentence based on "all methamphetamine amounts properly attributable to him under the guidelines." The court noted that in sentencing a defendant, a district court "should apply a preponderance of the evidence standard" when making relevant findings of fact. (Pet. App. 1st opinion).

On August 30, 2006, the district court resentenced Mr. McClellan. After hearing argument from both parties, the court again noted that the jury in this case specifically found that Mr.

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[1] In addition, the presentence report determined that Mr. McClellan was responsible for in excess of 1.5 kilograms of methamphetamine. Pet. App. 33.

McClellan was not responsible for 1.5 kilograms of methamphetamine. It again determined that the correct offense level based on the jury's verdict was 20. Based on this finding, the district court concluded that its original judgment of 36 months was a reasonable sentence and stated that it was "reimposing a sentence of 36 months and adopting the initial sentence entered on September 8, 2005, as the sentence in this case." Pet. App. 53-54.

The court then, however, stated that it would "make its own findings based on the evidence at the trial and as contained in the presentence report" as to drug quantity, the finding it had been directed to make by the mandate of the prior decision. Pet. App. 54. The court found that Mr. McClellan "was, in fact, involved with a quantity of at least 500 grams of a mixture or a substance containing a detectable amount of methamphetamine" and that "defendant's involvement was of such a nature and to the extent that he knew, understood and foresaw the involvement of the conspiracy in the amount of at least 500 grams." *Id.* Based on this finding of drug quantity, the district court found that Mr. McClellan's offense level was 32, which yielded a guideline range of imprisonment of between 121 and 151 months. Pet. App. 55. The court stated "[t]his is an alternative judgment, and except for this change as to time imposed, the remainder of the original judgment entered in this case is adopted in the entry of this alternative judgment." Pet. App. 55. It further explained, "So, there are two judgments. The first will be imposing the original judgment. The alternative judgment, if the court finds that I have the authority to find facts by a preponderance of the evidence." Pet. App. 55-56.

Thus, the district court entered two judgments. These amended judgments are identical but for the amount of time Mr. McClellan is to be imprisoned. In the first amended judgment, Mr. McClellan is sentenced to 36 months imprisonment. In the second amended judgment, Mr. McClellan is sentenced to 121 months imprisonment. Pet. App. 6-31. The sole difference between the two judgments is the length of sentence based on the district court's drug quantity determination.

The government again appealed to the Fourth Circuit. Finding that, "a district court does not violate the Sixth Amendment by making factual findings as to drug quantity by a preponderance of the evidence as long as the fact-finding does not enhance the sentence beyond the maximum term specified in the substantive statute," the Fourth Circuit vacated the amended judgment and remanded for resentencing in accordance with the 121 month alternative amended judgment. Pet. App. 4. This petition follows.

## REASONS WHY THE WRIT SHOULD ISSUE

### I. The Court should decide whether, under advisory guidelines, the use of judicially found facts to increase sentence violates the Sixth Amendment.

The Fourth Circuit has ordered the district court to impose a 121 month sentence on Mr. McClellan based solely on the district court's determination of drug quantity. Absent that finding, Mr. McClellan's sentence would be 36 months. The advisory guidelines have been applied to Mr. McClellan in a manner that violates his rights under the Sixth Amendment.

In *United States v. Booker*, 543 U.S. 220 (2005), this Court chose a constitutional remedy intended to render the sentencing guidelines "effectively advisory." *Id.* at 245. The Court sought to achieve this result by (1) eliminating the statutory provision in § 3553(b) that required district courts to impose guidelines sentences "in the absence of circumstances that warranted a departure," and (2) by eliminating the appellate review provisions intended to enforce guidelines sentencing (section 3742(e)). *Id.* at 259, 261. In excising section 3553(b), the Court directed that sentencing judges make individual sentencing decisions grounded in all the facts set forth in 18 U.S.C. § 3553(a). *See id.* at 245. Sentencing judges must still consider the guidelines range as one such factor, but the constitutional remedy required that judges be free to impose non-guidelines sentences grounded in the other 3553(a) considerations. *Id.* Those factors included "the nature and circumstances of the offense and the history and characteristics of the defendant," the need to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment," to "protect the public," to provide the defendant with training, care, "or other correctional treatment in the most effective manner," and the need to avoid unwarranted sentence disparities. 18 U.S.C. §§ 3553(a)(1), 3553(a)(2)(A)-(D), 3553(a)(6).

In excising the appellate review provisions of section 3742(e) this Court recognized a surviving right to appellate review of sentences to determine whether they are "unreasonable." *Booker*, 543 U.S. at 261. This Court modeled such review on the reasonableness review previously applied to non-guidelines sentencing according to the pre-2003

version of Section 3742(e). *Id.* Under this standard, appellate courts assess the district court's sentence

> with a view toward determining whether such a sentence '*is unreasonable,* having regard for... the factors to be considered in imposing a sentence, as set forth in [§ 3553(a)], and... the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c).'

*Id.* (*quoting* 18 U.S.C. § 3742(e)(3) (1994 ed.) emphasis added in *Booker*).

This remedy, however, is not complete. In subsequent cases, Justice Scalia has noted that the door remains open for a defendant to demonstrate that the Guidelines are nonetheless unconstitutional as they have been applied to him. Justice Scalia has noted that the Court's opinions on reasonableness review do "not rule out as-applied Sixth Amendment challenges to sentences that would not have been upheld as reasonable on the facts encompassed by the jury verdict or guilty plea." *Rita v. United States*, 127 S. Ct. 2456, 2479 (2007) (Scalia, J., concurring). *See also, Gall v. United States*, 128 S. Ct. 586, 602-03 (2007) (Scalia, J., concurring) ("The door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury.").

In this case, the advisory guidelines have been applied to Mr. McClellan in violation of his Sixth Amendment rights. Mr. McClellan's sentence would not be mandated by the Fourth Circuit but for the

existence of a judicial finding of drug quantity. Neither the district court nor the Fourth Circuit have identified any other factor as a basis for the higher sentence. The jury was asked to find Mr. McClellan responsible for in excess of 1.5 kilograms of methamphetamine and declined to do so. The district court has twice stated its view that the jury verdict justifies a sentence of 36 months. As the district court made clear, the only difference between the alternative judgments it has issued are its finding of drug quantity above what the jury found. Pet. App. 47-50. The Fourth Circuit thus has ordered imposition of the higher sentence based on the court's drug quantity finding by itself. The advisory guidelines have been applied to Mr. McClellan in a manner that violates his rights under the Sixth Amendment.

II. **The reasonableness review undertaken by the Fourth Circuit in this case was in contravention of the holding in *Gall*.**

The opinion in this case was issued on December 10, 2007, the same day this Court announced its decision in *Gall*. This case is an extreme example of the degree to which the Guidelines enjoyed a presumption of correctness under Fourth Circuit reasonableness review prior to *Gall*. Both the district court and the Fourth Circuit regarded the district court's role as drug quantity factfinder, and the guideline calculation, as the only relevant consideration. In reversing, the Fourth Circuit ordered imposition of the higher sentence in lieu of individualized consideration of all of the statutory factors.

Under *Gall*, appellate review requires more than review of the applicable guideline range. In *Gall*, this Court set out the procedure for appellate review of sentences:

> Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give to deference to the district court's decision that the §3553(a) factors, on a whole,

> justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.

*Gall*, 128 S. Ct. at 597.

The standard of reasonableness review employed in the Fourth Circuit in Mr. McClellan's case fails to comply with *Gall*. The Fourth Circuit reversed the district court for failing to comply with the procedural requirements of its precedents such as *United States v. Moreland*, 437 F.3d 424 (4th Cir. 2006) under which the district court's first step in sentencing is to calculate the applicable guideline range. But in remanding for imposition of the higher sentence in lieu of one that took into consideration the § 3553(a) factors, it followed its precedent that non-guidelines sentences were reviewed from the premise that the guidelines established the reasonable range of sentencing. *See*, *Moreland*, 437 F.3d at 433 ("A sentence that falls within the properly calculated advisory guidelines range is entitled to a rebuttable presumption of reasonableness."). Under prior Fourth Circuit precedent reasonableness was determined by first examining, "whether the district court acted reasonably with respect to (1) the imposition of a variance sentence, and (2) the extent of the variance." *Moreland*, 437 F.3d at 434. Finally, the Fourth Circuit determined how compelling the district court's reasons were as to the extent of the variance. *See Id.* at 434 ("The farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be.") This approach shifted the appellate focus from

assessing the reasonableness of the district court's stated reasons for the sentence against all the factors enumerated under 18 U.S.C. § 3553(a) to the limited question of whether the judge reasonably chose to depart from the guidelines range and whether the extent of that guidelines variance was reasonable.[2]

Accordingly, the Fourth Circuit ordered imposition of the 121 month sentence where the guidelines were treated as presumptively correct, where the record reveals no independent consideration of the § 3553(a) factors,[3] and where the guideline range was presumed to be the correct sentence. All of the foregoing is in contravention of *Gall* and the Fourth Circuit opinion should be vacated.

## III. Mr. McClellan was resentenced in contravention of the district court procedure set out in *Gall*.

In accordance with then-prevailing Fourth Circuit precedent, the alternative sentence the Fourth Circuit directed be imposed was determined

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[2] The Fourth Circuit's version of "reasonableness" review essentially revived 18 U.S.C. §3553(b), which "required sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure)." *See Booker*, 543 U.S. at 259. Further, the Fourth Circuit's approach to assessing reasonableness replaced the substantial deference historically granted to a sentencing judge's discretion in resolving the myriad considerations involved in choosing a sentence. *See Koon v. United States*, 518 U.S. 81, 97-99 (1996).

[3] The district court did state that it had considered the § 3553(a) factors. It did not, however, state what those factors were. And it stated that it had considered the factors after it had imposed the alternative sentences of 36 and 121 months. Pet. App. 3, 49.

in a manner that is contrary to this Court's holding in *Gall*. It was determined solely by the guideline determination, gave no weight to the § 3553(a) factors, and presumed that the guidelines range was reasonable.

This is contrary to the *Gall* holding, in which this Court stated:

> As we explained in *Rita*, a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented. If he decides that an outside Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one. After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful

> appellate review and to promote the perception of fair sentencing.

*Gall*, 128 S. Ct. at 596-97 (citation omitted).

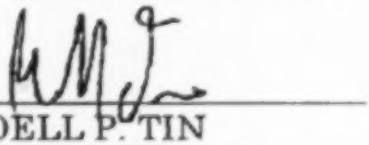
The district court has found that 36 months is an appropriate sentence. Pet. App. 47. It has also found that 121 months is an appropriate sentence. Pet. App. 49. It is a logical impossibility that one sentence almost four times the other satisfies the same statutory factors. It is also a logical impossibility that both sentences reflect an individualized consideration of the facts before the district court. Further, because the Fourth Circuit resolved the issue of the district court's role as sentencing factfinder with an order remanding for imposition of the higher sentence, the district court has made no individualized consideration of whether an outside-guidelines sentence is warranted. Rather, consistent with then-prevailing Fourth Circuit precedent in which the guidelines sentence was presumed correct and deviations required substantial justification, the sentence is nothing more than a reflection of the applicable guideline range. The Fourth Circuit having ordered the district court to impose a guideline sentence to the exclusion of all other factors, this decision should be reversed so that Mr. McClellan can be resentenced in a hearing in which the guideline sentence is not presumed to be correct.

## CONCLUSION

For the reasons stated herein, this Honorable Court should grant Mr. McClellan's Petition for Writ of Certiorari.

This the 10th day of March, 2008.

Respectfully submitted,



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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-5101

UNITED STATES OF AMERICA,
Plaintiff - Appellant,

versus

STEPHEN DALE MCCLELLAN,
Defendant - Appellee.

Appeal from the United States District Court
for the Western District of North Carolina,
at Asheville. Lacy H. Thornburg,
District Judge. (1:04-cr-00074-5)

Submitted: November 28, 2007
Decided: December 10, 2007
[Entered: December 10, 2007]

Before WILLIAMS, Chief Judge, and WILKINS
and HAMILTON, Senior Circuit Judges.

Vacated and remanded by
unpublished per curiam opinion.

Gretchen C. F. Shappert, United States Attorney, Charlotte, North Carolina, Amy E. Ray, Assistant United States Attorney, Asheville, North Carolina, for Appellant. R. Deke Falls, BARNETT & FALLS, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

This case is before the court a second time after a remand to the district court for the resentencing of Stephen Dale McClellan. The United States appeals the amended judgment imposing a sentence of thirty-six months' imprisonment, challenging the district court's calculation of McClellan's sentencing range under the Sentencing Guidelines. For the reasons that follow, we vacate the district court's amended judgment and remand the case for resentencing in accordance with the district court's alternative amended judgment.

On August 2, 2004, McClellan was charged along with six others with conspiracy to possess with the intent to distribute in excess of 1.5 kilograms of methamphetamine, in violation of 21 U.S.C. §§ 841, 846 (West 1999 & Supp. 2007). Following a jury trial, McClellan was found guilty of the charged offense. By special verdict, the jury found that the conspiracy involved at least 1.5 kilograms of methamphetamine. The jury further found that McClellan did not know and could not have reasonably foreseen the involvement of at least 1.5 kilograms of methamphetamine.

At the original sentencing hearing, the district court determined that it could only sentence McClellan based on the twenty grams of methamphetamine he admitted at trial, in light of the jury's special verdict findings. On this basis, the district court found that McClellan's offense level was 20, yielding a sentencing range under the Guidelines of thirty-three to forty-one months'

imprisonment. McClellan was sentenced to thirty-six months' imprisonment. The Government appealed.

We vacated McClellan's sentence and remanded the case for resentencing because, "[b]y failing to take the imperative initial step of calculating McClellan's sentence under the Guidelines, using all methamphetamine amounts properly attributable to McClellan under the Guidelines, the court erred as a matter of law." United States v. McClellan, 182 F. App'x 224 (4th Cir. 2006) (unpublished).

On remand, the district court again stated its belief that it could apply the advisory guidelines only using the drug quantity McClellan admitted at trial. On that basis, the district court entered an "Amended Judgment" imposing the original thirty-six month sentence. In addition, in recognition of our mandate on remand, the district court examined the record and found that McClellan "knew, understood and foresaw the involvement of the conspiracy in the amount of at least 500 grams." That finding supported an offense level of 32. See U.S. Sentencing Guidelines Manual § 2D1.1(c)(4) (2004). With a criminal history category of I, McClellan's guidelines sentence range was 121-151 months' imprisonment. The district court, "having considered the factors noted in 18 U.S.C. § 3553(a)," ordered a sentence of 121 months' imprisonment in the "Alternative Amended Judgment".

In imposing a sentence following the Supreme Court's decision in United States v. Booker, 543 U.S. 220, 261-62 (2005), a district court must (1) properly calculate the sentencing guidelines range; (2) determine whether a sentence within that range serves the factors under 18 U.S.C.A. § 3553(a) (West

2000 & Supp. 2007); (3) implement mandatory statutory limitations; and (4) explain its reasons for selecting a sentence, especially a sentence outside the range. United States v. Green, 436 F.3d 449, 455-56 (4th Cir.), cert. denied, 126 S. Ct. 2309 (2006).

Under an advisory guidelines scheme, a district court does not violate the Sixth Amendment by making factual findings as to drug quantity by a preponderance of the evidence as long as the fact-finding does not enhance the sentence beyond the maximum term specified in the substantive statute. See United States v. Morris, 429 F.3d 65, 72 (4th Cir. 2005), cert. denied, 127 S. Ct. 121 (2006).

On remand, we instructed the district court to make the appropriate findings regarding drug quantity in applying the advisory guidelines. The district court's failure to do so, as reflected in the amended judgment, again violated the dictates of Moreland and Green. Accordingly, we vacate the amended judgment and remand for resentencing in accordance with the district court's alternative amended judgment.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

VACATED AND REMANDED

AO 245C (WDNC Rev. 4/04)
Judgment in a Criminal Case
sheet 1

United States District Court
For the Western District of North Carolina

Filed October 2, 2006
[Entered October 2, 2006]

Amended Judgment in a Criminal Case
(For Offenses Committed On or
After November 1, 1987)

Case Number: 1:04cr74-5
USM Number: 18758-058

UNITED STATES OF AMERICA

v.

STEPHEN DALE MCCLELLAN
(Name of Defendant)

R. Deke Falls
Defendant's Attorney

Date of Original Judgment: September 9, 2005
(Or Date of Last Amended Judgment)

**Reason for Amendment:**

X Correct of Sentence on Remand

__ Reduction of Sentence for Changed Circumstances (Fed. R. P. 35(b)

__ Correction of Sentence by Sentencing Court (Fed. R. Crim. P.

__ Correction of Sentence for Clerical Mistake (Fed. R. Crim P.)

__ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))

__ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3852(c)(1)

__ Modification of Imposed Term of Imprisonment for Retroactive to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2)

__ Direct Motion to the Court

__ 28 U.S.C. § 2255 or

__ 18 U.S.C. § 3559(c)(7)

__ Modification of Restitution Order 18 U.S.C. § 3664

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s)

THE DEFENDANT:

__ Pleaded guilty to counts.
__ Pleaded nolo contendere to count(s) which was accepted by the court.
X was found guilty on count(s) 1 after a plea of not guilty.

| Title and Section | Nature of Offense | Date Offense Concluded | Counts |
|---|---|---|---|
| 21 U.S.C. 841, 846 | Conspiracy to possess w/intent to distribute methamphetamine, Sch. II | January, 2001 to present | 1 |

The Defendant is sentenced as provided in pages 2 through of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 reference to Booker, and 128 U.S.C. 3553(a).

__ The Defendant has been found not guilty on counts(s).
__ Count(s)(is)(are) dismissed on he motion of the United States.

IT IS ORDERED that the Defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: August 30, 2006

/s/ Lacy H. Thornburg
United States District Judge
Date: October 2, 2006

AO 245C (WDNC Rev. 4/04) Judgment in a Criminal Case



Defendant: STEPHEN DALE MCCLELLAN
Case Number 1:04cr74-5

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 36 months.

X The Court makes the following recommendations to the Bureau of Prisons:

The Court calls to the attention of the custodial authorities that defendant has a history of substance abuse and recommends he be allowed to participate in any available substance abuse programs while incarcerated pursuant to 18 USC 3621(e)(2).

X The defendant is remanded to the custody of the United States Marshall.

__ The defendant shall surrender to the United States Marshall for this district.

__ At ____ On ____.
__ As notified by the United States Marshall.

__ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

__ Before 2pm on
__ As notified by the United States Marshall.
__ As notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this Judgment as follows:

Defendant delivered on ___ to ___.

At ___, with a certified copy of this Judgment.

United States Marshall
by: Deputy Marshall

AO 245C (WDNC Rev. 4/04) Judgment in a Criminal Case

Judgment-Page 3 of 5

Defendant: STEPHEN DALE MCCLELLAN
Case Number 1:04cr74-5

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 Years.

__ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

## STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.
3. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release on a schedule to be established by the court.
4. The defendant shall provide access to any personal or business financial information as requested by the probation officer.
5. The defendant shall not acquire any new lines of credit unless authorized to do so in advance by the probation officer.

6. The defendant shall not leave the Western District of North Carolina without the permission of the Court or probation officer.

7. The defendant shall report in person to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

8. A defendant on supervised release shall report in person to the probation officer in the district to which he or she is released within 72 hours of release from custody of the Bureau of Prisons.

9. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

10. The defendant shall support his or her dependents and meet other family responsibilities.

11. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other activities authorized by the probation officer.

12. The defendant shall notify the probation officer within 72 hours of any change in residence or employment.

13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as duly prescribed by a licensed physician.

14. The defendant shall participate in a program of testing and treatment or both for substance abuse if directed to do so by the probation officer, until such time as the defendant is released from the program by the probation officer; provided, however,

that defendant shall submit to a drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter for use of any controlled substance, subject to the provisions of 18:3563(a)(5) or 18:3583(d), respectively.

15. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

16. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

17. The defendant shall submit his person, residence, office or vehicle to a search, from time to time, conducted by any U.S. Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant; and failure to submit to such a search may be grounds for revocation of probation or supervised release. The defendant shall warn other residents or occupants that such premises or vehicle may be subject to searches pursuant to this condition.

18. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed by the probation officer.

19. The defendant shall notify the probation officer within 72 hours of defendant's being arrested or questioned by a law enforcement officer.

20. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

21. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

22. If the instant offense was committed on or after 4/24/96, the defendant shall notify the probation officer of any material changes in defendant's economic circumstances which may affect the defendant's ability to pay any monetary penalty.

23. If home confinement (home detention, home incarceration or curfew) is included you may be required to pay all or part of the cost of the electronic monitoring or other location verification system program based upon your ability to pay as determined by the probation officer.

24. The defendant shall cooperate in the collection of DNA as directed by the probation officer.

ADDITIONAL CONDITIONS:

AO 245C (WDNC Rev. 4/04) Judgment in a Criminal Case



Defendant: STEPHEN DALE MCCLELLAN
Case Number 1:04cr74-5

## CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

| ASSESSMENT | FINE | RESTITUTION |
|---|---|---|
| $100.00 | $0.00 | $0.00 |

## FINE

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

X The court has determined that he defendant does not have the ability to pay interest and it is ordred that:

X The interest requirement is waived.

__ The interest requirement is modified as follows:

## COURT APPOINTED COUNSEL FEES

__ The defendant shall pay court appointed counsel fees.

__ The defendant shall pay $__ towards court appointed fees.

AO 245C (WDNC Rev. 4/04) Judgment in a Criminal Case

Judgment-Page 5 of 5

Defendant: STEPHEN DALE MCCLELLAN
Case Number 1:04cr74-5

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A __ Lump sum payment of $__ due immediately, balance due

__ Not later than __, or
__ In accordance __ (C), __ (D) below; or

B X Payment to being immediately (may be combined with __(C), X (D) below); or

C __ Payment in equal ___ (E.g. weekly, monthly or quarterly) installments of $ ___ To commence ___ (E.g. 30 or 60 days) after the date of this judgment.

D X Payment in equal Monthly (E.g. weekly, monthly, quarterly) installments of $ 50.00 To commence 60 (E.g. 30 or 60 days) after release from imprisonment to a term of supervision. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and may request the court to establish or modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

__ The defendant shall pay the cost of prosecution.
__ The defendant shall pay the following court costs:
__ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 309 U.S. Courthouse, 100 Otis Street, Asheville, NC 28201, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

AO 245C (WDNC Rev. 4/04)
Judgment in a Criminal Case
sheet 1

**United States District Court**
**For the Western District of North Carolina**
**ALTERNATIVE**

**Filed October 2, 2006**
**[Entered October 2, 2006]**

**Amended Judgment in a Criminal Case**
(For Offenses Committed On or
After November 1, 1987)

Case Number: 1:04cr74-5
USM Number: 18758-058

UNITED STATES OF AMERICA

v.

STEPHEN DALE MCCLELLAN
(Name of Defendant)

R. Deke Falls
Defendant's Attorney

**Date of Original Judgment:** September 9, 2005
**(Or Date of Last Amended Judgment)**

Reason for Amendment:

X Correct of Sentence on Remand

__ Reduction of Sentence for Changed Circumstances (Fed. R. P. 35(b)

__ Correction of Sentence by Sentencing Court (Fed. R. Crim. P.

__ Correction of Sentence for Clerical Mistake (Fed. R. Crim P.)

__ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))

__ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3852(c)(1)

__ Modification of Imposed Term of Imprisonment for Retroactive to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2)

__ Direct Motion to the Court

__ 28 U.S.C. § 2255 or

__ 18 U.S.C. § 3559(c)(7)

__ Modification of Restitution Order 18 U.S.C. § 3664

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s)

THE DEFENDANT:

__ Pleaded guilty to counts.
__ Pleaded nolo contendere to count(s) which was accepted by the court.
X was found guilty on count(s) 1 after a plea of not guilty.

| Title and Section | Nature of Offense | Date Offense Concluded | Counts |
|---|---|---|---|
| 21 U.S.C. 841, 846 | Conspiracy to possess w/intent to distribute methamphetamine, Sch. II | January, 2001 to present | 1 |

The Defendant is sentenced as provided in pages 2 through of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 reference to Booker, and 128 U.S.C. 3553(a).

__ The Defendant has been found not guilty on counts(s).
__ Count(s)(is)(are) dismissed on he motion of the United States.

IT IS ORDERED that the Defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: August 30, 2006

/s/ Lacy H. Thornburg
United States District Judge
Date: October 2, 2006

AO 245C (WDNC Rev. 4/04) Judgment in a Criminal Case



Defendant: STEPHEN DALE MCCLELLAN
Case Number 1:04cr74-5

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 121 months.

X The Court makes the following recommendations to the Bureau of Prisons:

The Court calls to the attention of the custodial authorities that defendant has a history of substance abuse and recommends he be allowed to participate in any available substance abuse programs while incarcerated pursuant to 18 USC 3621(e)(2).

X The defendant is remanded to the custody of the United States Marshall.

__ The defendant shall surrender to the United States Marshall for this district.

__ At ____ On ____.
__ As notified by the United States Marshall.

__ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

__ Before 2pm on
__ As notified by the United States Marshall.
__ As notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this Judgment as follows:

Defendant delivered on ___ to ___.

At ___, with a certified copy of this Judgment.

United States Marshall
by: Deputy Marshall

AO 245C (WDNC Rev. 4/04) Judgment in a Criminal Case



Defendant: STEPHEN DALE MCCLELLAN
Case Number 1:04cr74-5

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 Years.

__ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

## STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.
3. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release on a schedule to be established by the court.
4. The defendant shall provide access to any personal or business financial information as requested by the probation officer.
5. The defendant shall not acquire any new lines of credit unless authorized to do so in advance by the probation officer.

6. The defendant shall not leave the Western District of North Carolina without the permission of the Court or probation officer.

7. The defendant shall report in person to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

8. A defendant on supervised release shall report in person to the probation officer in the district to which he or she is released within 72 hours of release from custody of the Bureau of Prisons.

9. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

10. The defendant shall support his or her dependents and meet other family responsibilities.

11. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other activities authorized by the probation officer.

12. The defendant shall notify the probation officer within 72 hours of any change in residence or employment.

13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as duly prescribed by a licensed physician.

14. The defendant shall participate in a program of testing and treatment or both for substance abuse if directed to do so by the probation officer, until such time as the defendant is released from the program by the probation officer; provided, however,

that defendant shall submit to a drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter for use of any controlled substance, subject to the provisions of 18:3563(a)(5) or 18:3583(d), respectively.

15. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

16. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

17. The defendant shall submit his person, residence, office or vehicle to a search, from time to time, conducted by any U.S. Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant; and failure to submit to such a search may be grounds for revocation of probation or supervised release. The defendant shall warn other residents or occupants that such premises or vehicle may be subject to searches pursuant to this condition.

18. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed by the probation officer.

19. The defendant shall notify the probation officer within 72 hours of defendant's being arrested or questioned by a law enforcement officer.

20. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

21. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

22. If the instant offense was committed on or after 4/24/96, the defendant shall notify the probation officer of any material changes in defendant's economic circumstances which may affect the defendant's ability to pay any monetary penalty.

23. If home confinement (home detention, home incarceration or curfew) is included you may be required to pay all or part of the cost of the electronic monitoring or other location verification system program based upon your ability to pay as determined by the probation officer.

24. The defendant shall cooperate in the collection of DNA as directed by the probation officer.

ADDITIONAL CONDITIONS:

AO 245C (WDNC Rev. 4/04) Judgment in a Criminal Case

Judgment-Page 4 of 5

Defendant: STEPHEN DALE MCCLELLAN
Case Number 1:04cr74-5

## CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

| ASSESSMENT | FINE | RESTITUTION |
|---|---|---|
| $100.00 | $0.00 | $0.00 |

## FINE

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

X The court has determined that he defendant does not have the ability to pay interest and it is ordred that:

X The interest requirement is waived.

__ The interest requirement is modified as follows:

## COURT APPOINTED COUNSEL FEES

__ The defendant shall pay court appointed counsel fees.

__ The defendant shall pay $__ towards court appointed fees.

AO 245C (WDNC Rev. 4/04) Judgment in a Criminal Case

Judgment-Page 5 of 5

Defendant: STEPHEN DALE MCCLELLAN
Case Number 1:04cr74-5

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A __ Lump sum payment of $__ due immediately, balance due

__ Not later than __, or

__ In accordance __ (C), __ (D) below; or

B X Payment to being immediately (may be combined with __(C), X (D) below); or

C __ Payment in equal ____ (E.g. weekly, monthly or quarterly) installments of $ ___ To commence ___ (E.g. 30 or 60 days) after the date of this judgment.

D X Payment in equal Monthly (E.g. weekly, monthly, quarterly) installments of $ 50.00 To commence 60 (E.g. 30 or 60 days) after release from imprisonment to a term of supervision. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and may request the court to establish or modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

__ The defendant shall pay the cost of prosecution.
__ The defendant shall pay the following court costs:
__ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 309 U.S. Courthouse, 100 Otis Street, Asheville, NC 28201, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-5005

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

versus

STEPHEN DALE MCCLELLAN,

Defendant - Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Lacy H. Thornburg, District Judge. (CR-04-74)

Submitted: May 11, 2006
Decided: May 25, 2006
[Entered: May 25, 2006]

Before WILKINS, Chief Judge,
WILLIAMS, Circuit Judge, and
HAMILTON, Senior Circuit Judge.

Vacated and remanded by
unpublished per curiam opinion.

Gretchen C. F. Shappert, United States Attorney, Charlotte, North Carolina; Amy E. Ray, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Asheville, North Carolina, for Appellant. R. Deke Falls, BARNETT & FALLS, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

The United States appeals the sentence imposed on Stephen Dale McClellan, principally challenging the district court's calculation of McClellan's sentencing range under the Guidelines. For the reasons that follow, we vacate the sentence and remand the case for resentencing.

On August 2, 2004, McClellan was charged along with six others with conspiracy to possess with the intent to distribute in excess of 1.5 kilograms of methamphetamine, 21 U.S.C. §§ 841 and 846. Following a jury trial, McClellan was found guilty of the charged offense. By special verdict, the jury found that the conspiracy involved at least 1.5 kilograms of methamphetamine but that McClellan did not know and could not have reasonably foreseen the involvement of at least 1.5 kilograms of methamphetamine.

In preparation for sentencing, a presentence report (PSR) was prepared. In the PSR, the probation officer calculated a base offense level of 34 based on a determination that the conspiracy involved at least 1.5 kilograms of methamphetamine. A base offense level of 34, coupled with a criminal history category of I, produced a sentencing range under the Guidelines of 151 to 188 months' imprisonment.

At the sentencing hearing on August 31, 2005, the district court determined that, in light of the jury's special verdict finding that McClellan did not know and could not have reasonably foreseen the

involvement of at least 1.5 kilograms of methamphetamine, the court could only sentence McClellan based on the twenty grams of methamphetamine he admitted at trial that he possessed. Based on the court's determination that McClellan was responsible for twenty grams of methamphetamine, the court found that McClellan's offense level was 20, yielding a sentencing range under the Guidelines of 33 to 41 months' imprisonment. The court then sentenced McClellan to thirty-six months' imprisonment. The government noted a timely appeal.

On appeal, the government contends that McClellan's sentence was unreasonable as a matter of law because the district court erred in calculating the sentencing range under the Guidelines. More specifically, the government posits that the court erred as a matter of law when it concluded that it could only sentence McClellan based on the twenty grams of methamphetamine he admitted at trial that he possessed.

Following the Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005), a sentencing court is no longer bound by the sentencing range prescribed by the Guidelines. United States v. Moreland, 437 F.3d 424, 432 (4th Cir. 2006); United States v. Green, 436 F.3d 449, 455-56 (4th Cir. 2006); United States v. Hughes, 401 F.3d 540, 546 (4th Cir. 2005). Post-Booker, when reviewing a sentence, we must "determine whether the sentence is within the statutorily prescribed range and is reasonable." Moreland, 437 F.3d at 433 (citation and internal quotation marks omitted). In imposing a sentence post-Booker, sentencing courts must:

> (1) properly calculate the sentence range recommended by the Sentencing Guidelines; (2) determine whether a sentence within that range and within statutory limits serves the factors set forth in § 3553(a) and, if not, select a sentence that does serve those factors; (3) implement mandatory statutory limitations; and (4) articulate the reasons for selecting the particular sentence, especially explaining why a sentence outside of the Sentencing Guideline range better serves the relevant sentencing purposes set forth in § 3553(a).

Green, 436 F.3d at 456 (citation and internal footnote omitted).

Under Green, a sentence imposed within the sentencing range calculated under the Guidelines is "presumptively reasonable." Id. at 457 (citation and internal quotation marks omitted). If the sentence deviates from the sentencing range, we must determine whether, in light of the factors set forth in § 3553(a) and the relevant provisions of the Guidelines, the district court "acted reasonably with respect to (1) the imposition of a variance sentence, and (2) the extent of the variance." Moreland, 437 F.3d at 434.

Moreover, a post-Booker sentence may be unreasonable for both procedural and substantive reasons. "A sentence may be procedurally unreasonable, for example, if the district court provides an inadequate statement of reasons or fails to make a necessary factual finding. A sentence may be substantively unreasonable if the court relies on an improper factor or rejects policies articulated by Congress or the Sentencing Commission." Id.

In this case, the district court plainly stated on the record that it was limited to sentencing McClellan based on the twenty grams of methamphetamine he admitted at trial that he possessed. according to the court, to sentence McClellan based on any other amount would violate both Booker and McClellan's Sixth Amendment rights. Unquestionably, the district court's sentencing approach violates the dictates of Moreland, Green, and Hughes, which all require the sentencing court first to calculate the defendant's sentencing range under the Guidelines. By failing to take the imperative initial step of calculating McClellan's sentence under the Guidelines, using all methamphetamine amounts properly attributable to McClellan under the Guidelines, the court erred as a matter of law.* This error of law rendered the sentence imposed unreasonable. Cf. Green, 436 F.3d

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*Indeed, we have noted that, in sentencing a defendant post-Booker, a sentencing court should apply a preponderance of the evidence standard, taking into account that the resulting sentencing range under the Guidelines is advisory only:

> Booker does not in the end move any decision from judge to jury, or change the burden of persuasion. The remedial portion of Booker held that decisions about sentencing factors will continue to be made by judges, on the preponderance of the evidence, an approach that comports with the [S]ixth [A]mendment so long as the guideline system has some flexibility in application. As a practical matter, then, [a defendant's] sentence[] would be determined in the same way if [he was] sentenced today; the only change would be the degree of flexibility judges would enjoy in applying the guideline system.

United States v. Morris, 429 F.3d 65, 72 (4th Cir. 2005) (citation and internal quotation marks omitted).

at 460 ("Because Green's sentence was imposed as the result of an incorrect application of § 4B1.1 of the Sentencing Guidelines, we vacate the sentence as unreasonable and remand the case for further sentencing, consistent with this opinion.").

Accordingly, we vacate McClellan's sentence and remand for resentencing in compliance with Booker and its progeny. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

VACATED AND REMANDED

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
ASHEVILLE DIVISION

DOCKET NO. 1:04 CR 74

| | |
|---|---|
| UNITED STATES OF AMERICA | ) |
| | ) |
| vs. | ) |
| | ) |
| STEPHEN DALE McCLELLAN, | ) |
| | ) |
| Defendant. | ) |

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE
LACY H. THORNBURG
UNITED STATES DISTRICT COURT JUDGE
AUGUST 30, 2006

On Behalf of the Government:
Jill Westmoreland Rose,
Assistant U.S. Attorneys
United States Attorney's Office
Room 233, U.S. Courthouse
100 Otis Street
Asheville, North Carolina 28801

On Behalf of the Defendant:
Richard Deke Falls, Attorney at Law
Barnett and Falls
130-C North McDowell Street
Charlotte, North Carolina 28204-2268

PROCEEDINGS

(Wednesday, August 30, 2006, in open court; defendant present.)

THE COURT: We now call the case of United States of America vs. Stephen Dale McClellan.

This matter is before the Court on remand from the Fourth Circuit Court of Appeals. The United States and defendant are represented by counsel.

I will give each attorney ten minutes to address the Court concerning their positions on the question before the Court as to the appropriate sentence in this case.

I have read your presentations, I sat as the trial judge at the time the matter was heard, and so, with that background, Mr. Falls, I recognize you to proceed.

MR. FALLS: Thank you, Your Honor.

Your Honor, in my sentencing memorandum, I phrased that the issues for consideration for the Court are really two-fold. First, what is the applicable drug quantity in this case and how does the Court go about finding that drug quantity; and the second issue is whether the Court's original sentence of 36 months' imprisonment was a reasonable sentence and still is a reasonable sentence.

And so I start my argument with the position that the cannot make a finding in excess of 50 grains, and I hope my sentencing memorandum is pretty self-explanatory in respect and I hope I've been clear to the Court on that I'm not going to dwell on that issue any further.

The second issue deals with a specific remand before the Court. Again, despite the panel's decision, I contend that any finding of drug quantity based on facts not admitted by Mr. McClellan is unconstitutional. I understand the concept of law of the case, that an unpublished panel has directed this Court to determine drug quantity based on a preponderance of the evidence and, I assume, to consider all evidence.

There are two other published opinions of the Fourth Court Circuit, United States vs. Milam and United States vs. Revels, which I have cited in my memorandum, that seem to suggest that the Court did exactly what it was supposed to do the first time, and those panels, apparently, unless I'm reading them wrong, would have affirmed the Court's Sixth Amendment jurisprudence and would have adopted the Court's line of reasoning and affirmed the sentence.

So that puts the Court in the position of do I apply the law of the case from the unpublished decision of the panel that is in this case or do I consider the published opinions of two other panels that have said that it's Sixth Amendment error to consider anything other than what he's admitted or that the jury has specifically found.

And I will, specifically note the more recent case, is United States vs. Revels, and it plainly states that it was Sixth Amendment error for the Court to apply guidelines enhancements based on facts that were neither admitted by the defendant or found by a jury. That's a matter for the Court, and I leave that with Your Honor.

The final argument that I have about drug quantity, and I'm not sure the Court reached that in the first sentencing hearing. I was present for that sentencing hearing - - I was in the audience, so to speak - - is that the reliable evidence presented to the Court supports the finding of not more than 20 grams of methamphetamine. And I have included excerpts of testimony from the witnesses who the Court heard from.

One of the witnesses was a Mike Wilson, who testified that he delivered drugs to Mr. McClellan on behalf of a Tobby Crain and that he did this four or five times. Tobby Crain, also a government witness, then testified that Mike Wilson never delivered drugs for him to anybody or did any errands for him for anybody. That was the government's first witness, who was undermined by another government witness.

There were other witnesses, Brad Waycaster and Lori Broughton, who testified that they - - Lori Broughton testified she may have bought a gram from him a couple of times. Brad Waycaster testified that on two or three occasions he may have bought no more than 3-1/2 grams.

Hoke Benfield testified that he was involved with McClellan for a very short period of time, perhaps six months, and that he never observed McClellan selling any methamphetamine. He did supply him with amounts, but he never observed him selling and never spoke with him about whether he had sold any methamphetamine.

And all of these witnesses consistently testified that Mr. McClellan was a methamphetamine addict, that he used methamphetamine, that they all used

methamphetamine, and that what they did was essentially trade the methamphetamine back and forth, if one person had it, people would congregate there and use their methamphetamine. If somebody else had it, Mr. McClellan had it, they would congregate in his shed and they would use it there.

Tobby Crain and Kimberly Jaynes were the two witnesses who placed significant quantities of methamphetamine on Mr. McClellan, but neither one of them testified that they ever observed Mr. McClellan or ever spoke to him about whether he resold or saw him sell methamphetamine. And I would also note particularly that there must have been credibility problems with their testimony because, if it had been believed, the jury would have made a finding of in excess of 1.5 kilograms of methamphetamine, which they did not.

And then, finally, you have Mr. McClellan's testimony. He did testify in his own defense, and he admitted that he had purchased methamphetamine from Tobby Crain, Kim Jaynes and Jody Boyle. He admitted having a relationship with Lori Broughton and that he used methamphetamine with her on occasion. He denied Michael Wilson's testimony and he denied Tobby Crain's testimony about the significant quantities of methamphetamine. He stated that he purchased small amounts from him, sometimes once a week, sometimes not for a couple months or a month at a stretch, and that he only knew Crain for about a year.

There was no evidence of regular customers of Mr. McClellan. There was nobody who testified to seeing him ever packaging up methamphetamine as part of a distribution pattern.

What you have before the Court was evidence of a small group of individuals who are all addicted to methamphetamine and they all used small quantities and traded back and forth.

So, based on that testimony, Your Honor, we believe that the 20 grams that we submitted was reasonably foreseeable and the original sentencing hearing is supported by the reliable evidence, and that's a determination for the Court. You were here, you observed their testimony, and you can make that reliability call, and we believe that the evidence supports what he testified to, that he did not go on the stand and deny any involvement, he admitted his involvement, but that his involvement cones up to about 20 grams.

The second issue, Your Honor, is whether a 36-month term of imprisonment is reasonable. And to determine a reasonable sentence, the Court goes through 3553(a) and considers all the factors. One of the factors is the Guidelines. The court will determine the guideline range. After the Court considers the Guidelines, it goes through the remaining factors in 3553(a) to determine what is a reasonable sentence in the case.

The first factor under 3553(a) is the nature and circumstance of the offense. I hope I presented that to the Court in my memorandum succinctly and here today that the reliable evidence portrays a small network of friends and family members and acquaintances who used methamphetamine together and sold it back and forth in small quantities. There is no evidence that Mr. McClellan profited financially from his involvement in the offense.

The history and characteristics of the defendant. Mr. McClellan is 45 years of age. He's been married for 22 years. He and his wife have a 21-year-old daughter. He has no criminal history points. His only prior convictions were driving related that occurred 20 years ago. He has a. history of stable employment. He held the same job for 21 years before that company, Hampshire Hosiery, went out of business.

He has a strong support system in the community, Your Honor. Everybody in the courtroom seated back here today is here in support of him. They've been in support of him throughout this ordeal. This case has been an unusual hardship for him and his family, particularly his family. The court may remember that after he was incarcerated, his wife's mother and father and Mr. McClellan's sister all died within a period of a year and the Court granted leave to attend the funeral, although I think the funeral had already occurred because it may have been too late to do that.

His wife and his daughter are currently living with his sister. They have lost their family home. They have lost everything.

I submitted several letters of community support for the Court. There were also letters that were submitted at his original sentencing hearing, some I will remind the Court of. One is from the Mitchell County Sheriff's Department. The Sheriff of Mitchell County wrote a letter in support of Mr. McClellan, stated that he had never heard of him being involved in any kind of illegal activity. I received letters today from the family, from former employers, from people who he did work for in his landscaping business. They've always known him to be a hard-working person, family-oriented, a guy who takes care of his family and is an asset to the community.

Since his incarceration, he's taken the G.E.D. classes and has got into a residential drug abuse treatment program, and they've -- he's provided me with reports that indicate that he is learning skills on how to be more sociable. He's not a real sociable person and he doesn't have that skill set, but they said that he is making progress.

He has been clean and off methamphetamine for years now. And those --

THE COURT: I believe your time is about up.

MR. FALLS: If I can just conclude, Your Honor?

THE COURT: All

MR. FALLS: All right. The other factors, the need for the sentence imposed. We believe the 36 months is sufficient to reflect seriousness of the offence and to afford adequate deterrence.

The other factors I've analyzed in my sentencing memorandum, Your Honor. I hope I've put them forth adequately for you.

And I would just finally state to the Court that the Fourth Circuit did not say that your sentence of 36 months' imprisonment was unreasonable. What the Fourth Circuit said was you need to go back through the Guidelines again, but they did not say you cannot impose a sentence of 36 months' imprisonment. That is essentially for the Court. We think that is a reasonable sentence. Arid I know that the Well, I will conclude with that, Your Honor.

Thank you.

THE COURT: All right. Ms. Rose?

MS. ROSE: Thank you, Your Honor.

First, just a statement as to where we find ourselves with the law.

I see the defense, not only this counsel, but others, referring to Milam and Revels significantly, but Milam was not a -- it's a post-Booker case, and basically it related to objections to the presentence report, and basically what the Court held there is that Milam should not affect the guidelines calculations in post-Booker sentencings because the Guidelines are no longer mandatory, The problem in Milan was that the Court saw it as mandatory and did not make other considerations.

Revels said the same thing. Revels, in Footnote 2 of the opinion, clearly says nothing about this decision or Milam affects in any way the District Court's calculation of an advisory guideline range after the Booker sentencing, and I don't think anybody here would say that the Court doesn't have the ability to consider all the facts and all the evidence and all the law and make a determination. But what the Courts also say very clearly, Your

Honor, is that a guideline sentence is a presumptively reasonable sentence and that the further the Court departs from that presumptive guideline range that the greater the circumstances must be to support such a deterrence from those Guidelines.

So, really, Your Honor, we're back at the position that we were initially that the government took, is what was the evidence that the Court heard during the course of this trial, and there was significant evidence presented about the defendant's dealing, using, purchasing of methamphetamine.

What you will probably recall is that Tobby Crain, as Mr. Falls has told you, was one of the leaders of this group as far as the drug amounts that were distributed, and he distributed basically to three people within this conspiracy, Mr. Benfield, the defendant, and, from time to time, Mr. Wilson. But what was consistent throughout all that testimony were the drug amounts.

It was consistent that this defendant was fronted drugs by Mr. Crain. And if you will recall from the testimony, Mr. Crain said it didn't start out that way, but, as time passed, he began to front more drugs to this defendant.

Well, as this Court knows, no drug dealer is going to give up drugs to someone for free, and this defendant had to come back at some point and pay for those drugs so that he could get more, and based upon the amounts that they talked about, they were quite significant. The government submitted to the Court at that time that there was at least 500 grams, which was shown to the Court through the testimony by a preponderance of the evidence.

But it's not just that testimony which I chink was significant, Your Honor. There was the physical evidence which supported that testimony which made it more believable, which made it more credible: The fact that when this defendant was stopped by law enforcement, he had whose numbers programmed into his phone? Mr. Crain and Ms. Jaynes, Mr. Crain's girlfriend, who testified significantly about their contacts with the defendant.

. We heard evidence from everybody about this shed where they went to buy and use drugs with the defendant. We heard evidence about this security system that he had around this shed so that he could see it someone was approaching. This is not a situation of someone who is an addict and a small-time dealer. The only person who talked about 20 grams -- and I'm not even sure that was the full import of the defendant's testimony. As I recall, even he admitted more than that. But nonetheless, 20 grams is not a long-tern -- you'll remember, this was a conspiracy over a significant amount of time, and a 20-gram user ms not someone who is going to have this network, everybody talking about the amounts of drugs that were flowing through this conspiracy, and a small-time, 20-gram user is not going to be someone who has an elaborate security system around the place where he dealt his drugs.

And so I'd say to the Court, please consider all of the evidence.

One other thing I'd like to say relative to the Apprendi argument. As you know, because we don't have a drug minimum in this case, this Court can sentence the defendant anywhere up to 240 months under Apprendi, and so I would say to the Court that

the 500 grams that the government feels was submitted to the Court by a preponderance of the evidence certainly places the defendant at a lower range than that.

Finally, I would say to the Court, look at where the co-defendants in this case were sentenced. Look at even the people who admitted their responsibility, even the ones who said they were less engaged in this conspiracy than others, who admitted and cooperated with the government. Nobody got a sentence as low as this defendant, one who did not cooperate and who put the government to trial, The courts have been very clear that the Court can consider the fact that this defendant went to trial and put the government through its burden in considering his sentence relative to those who did not. And so I'd say to the Court, in consideration of all these factors, that we would submit to the Court that the Guidelines should be one of a 500-gram range.

Thank you.

THE COURT: All right. I'm going to read into the record some considerations for the Circuit to review as to how I reached the conclusions that I cone to, and I'm going to impose alternative judgments.

In case after case, the Fourth Circuit has held that "in a conspiracy case such as this one, the defendant should be held accountable for the conduct of others that was both in furtherance of the conspiracy and reasonably foreseeable in connection with the conspiracy. The drug quantity to be attributed to the defendant, therefore, is not limited to the amount he personally handled, but rather to

that amount that was reasonably foreseeable to him and in furtherance of the conspiracy."

"'A jury verdict convicting the defendant of participation in a single conspiracy does not obviate the need Car individual findings. Such a verdict speaks to the scope of the defendant's agreement only in very general terms. It does not address the question of which specific actions demonstrated at trial were in furtherance of that single conspiracy or were foreseeable to the conspirators.'"

I concluded that, in the original sentence, that I could only sentence the defendant to the quantity of drugs of which he admitted involvement in his testimony during the trial because of the special verdict, and the amounts set forth on which the presentence report relied were not foreseeable, Recent cases from the Fourth Circuit indicate that this approach was correct and must be repeated now.

In Booker, the Supreme Court held that any tact other than a prior conviction, which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict, must be admitted by the defendant or proved to a jury beyond a reasonable doubt. Admissions may take a variety of forms, including a guilty plea and stipulations, a defendant's own statements in open court and representations by counsel. However a defendant admits to facts, they may serve, once admitted, as the basis for an increased sentence without being proved to a jury beyond a reasonable doubt.

How does this apply to a defendant convicted of a conspiracy to possess with intent to distribute a specific quantity of controlled substance? Under

Collins, the jury must determine the specific amount of drugs attributable to each individual defendant for the purpose of setting a threshold drug quantity under Section 841(b). Individual members of a conspiracy should not be attributed the entire quantity of drugs distributed by the entire conspiracy. Both the indictment and the verdict forms asked the jury to determine the amount of drugs attributable to the entire conspiracy, not each individual defendant. Accordingly, we find plain error occurred in the defendant's sentencing that should be corrected.

That's quoting from U.S. vs. Munson, 2006 WL 1344598 (4th Cir. 2006); accord, United States vs. Sullivan, 455 F.3d 248 (4th Cir. July, 11, 2006). "The defendant was convicted under Count One, 21 U.S.C. § 841(a)(1) and (b)(1)(A)(iii) and Section 846 of a conspiracy to distribute more than 50· grams of cocaine base. Because the jury did not determine the quantity beyond that contained in the indictment, under Booker, we use only 50 grams in basic calculation of his sentence"; United States vs. Smith, 441 F.3d 254 at 273 (4th Cir. 2006), "Smith correctly maintains that the Fourth Circuit has held that a defendant charged with conspiracy is entitled under the Sixth Amendment to a jury determination of the quantity of drugs attributable to him as an individual rather than the quantity for which the conspiracy as a whole was responsible."

"At the time Irvin" -- I'm quoting now.

"At the time Irvin was decided, it was the district court that determined, under a preponderance of the evidence standard, the quantity of narcotics attributable to a defendant for purposes of setting

the specific threshold drug quantity under 841(b). Apprendi altered Irvin's holding by effectively replacing the words 'a district court' with 'the jury' and requiring proof beyond a reasonable doubt.

Although Apprendi modified Irvin in this manner, Irvin's holding that Pinkerton principles should be used to determine, for sentencing purposes, the amount of narcotics attributable to any one individual in a conspiracy remains good law. By failing to instruct the jury that for purposes of setting a specific threshold drug quantity under 841(b) the jury must determine what amount of cocaine base was attributable to Collins, the district court's sentence effectively attributed to Collins, an individual member of the conspiracy, the quantity of cocaine base distributed by the entire conspiracy. -

"Because the conviction of conspiracy to violate Section 841(a) is sound, remanding for a new trial is not the appropriate remedy. It is also clear that remanding the case for resentencing and permitting the district court to determine the quantity of cocaine base for 841(b) purposes would be inconsistent with the Sixth Amendment and Apprendi.

"We will withhold judgment as to the conspiracy count for 30 days. The government may elect to request that we affirm the conspiracy conviction and remand for Collins to be resentenced under the default provision in 841, or the government can request that we reverse Collins' conspiracy conviction and remand for a new trial."

That lengthy quotation comes from U.S. vs. Collins, 415 F.3d at 313-315 (4th Cir. 2005); accord, United States vs. Sander, 2006 WL 1114038 (4th

Cir. 2006). "Collins was convicted of conspiracy to distribute more than 50 grams of crack; however, the district court did not instruct the jury to determine the quantity of the crack attributable to Collins individually as required under Apprendi. The district court then compounded the error by attributing to Collins, for sentencing purposes, the amount of crack distributed by the whole conspiracy and applying the mandatory minimum ten-year sentence," U.S. vs. Gordon, 174 Fed. Appx. 744 (4th Cir. 2006), in dissent, "In the present case, Gordon pleaded guilty to a generally worded indictment that attributed 1,000 kilograms of marijuana to the conspiracy as a whole, Gordon argues that he did riot admit that any more than 315 kilograms was attributable to him, Therefore, the use of the judge's finding that at least 1,000 kilograms were attributable to him establishes plain error under the Sixth Amendment,"

Let the record reflect that the Court recognizes that the Fourth Circuit vacated defendant's sentence and remanded for resentencing. Of particular concern is the fact that the jury's verdict specifically found that the defendant did not reasonably foresee the involvement of the conspiracy with 1.5 kilograms of methamphetamine or that such a quantity was in furtherance of the conspiracy.

Based on the jury verdict, the Court finds that the correct offense level of 20, Criminal History Category I, with a guideline range of 33 to 41 months is correct, and, therefore, it is the judgment of the Court that the initial sentence imposed by this Court of 36 months is a reasonable sentence, and the Court, recognizing that the Guidelines are no longer mandatory, reimposes a sentence of 36 months and

adopts the initial sentence entered herein on September 8, 2005, as the sentence in this case.

The Court, however, recognizes what it considers to be the mandate of the Circuit on remand as a directive for the Court to make its own findings based on the evidence at the trial and as contained in the presentence report that the defendant was, in fact, involved with a quantity of at least 500 grams of a mixture or a substance containing a detectable amount of methamphetamine in the conspiracy and that the entire -- considering the entire evidence in the case, it did support a finding by a preponderance of the evidence by the Court that the defendant's involvement was of such a nature and to the extent that he knew, understood and foresaw the involvement of the conspiracy in the amount of at least 500 grams.

The evidence was to the effect that defendant was selling drugs, that he was involved with a girlfriend, who together were involved with the handling of drugs in substantial amounts; that the defendant had programmed in his cell phone the names of various parties involved with the drug conspiracy; and at the time of his arrest, defendant had cameras and a monitoring system to protect the shed involved in the drug distribution; that defendant began smoking meth in 2001 and became a confirmed drug addict; that defendant purchased ounce-quantities of methamphetamine for $1,000 each which was repackaged and sold; that defendant regularly made trips to his supplier, sometimes two to three times a week, purchasing amounts of two-ounce quantities or more.

Looking at the evidence as a whole, the Guideline for violation of 21 U.S.C. Sections 841(a)(1) and 846 found in U.S. Sentencing Guideline 2D1.1(c)(4) calls for an offense level of 34, a guideline range of 34, with a Criminal History of I --

MR. FALLS: Your Honor, I don't mean to interrupt the Court, but 500 grams is an offense level 32.

THE COURT: 32.

MR. FALLS: Thank you.

THE COURT: I was just fixing to check that.

Criminal History Category I - - guideline range of 32, Criminal History Category I, provides for a -- 500 grants produces an offense level of 32. An offense level of 32, Criminal History Category I produces a guideline range of 121 to 151 months.

The Court concludes that the Sentencing Guidelines in this case provide an appropriate window for the imposition of a reasonable sentence. Therefore, as an alternative sentence in this case, pursuant to the Sentencing Reform Act of 1984 and U.S. vs. Booker, it is the judgment of the Court, having considered the factors noted in 18 U.S.C. §3553(a), that the defendant, Stephen Dale McClellan, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 121 months. This is an alternative judgment, and except for this change as to time imposed, the remainder of the original judgment entered in this case is adopted in the entry of this alternative judgment.

So, there are two judgments. The first will be imposing the original judgment. The alternative judgment, if the Court finds that I have the

authority to find facts by a preponderance of the evidence. Having sat at the trial and reviewed the papers filed in the case, the Court, by a preponderance of the evidence determines that an appropriate amount was 500 grams and imposed the alternative judgment as to time on the basis of offense level 32, and then taking again into consideration Booker, the fact that the Guidelines are no longer mandatory, and 3553(a).

So, Mr. McClellan, you still have your right to appeal the judgment entered by the Court. You have demonstrated your knowledge of your right to appeal previously, so I won't go into an explanation again of those rights.

So that will conclude the hearing in the case. Thank you, gentlemen.

MR. FALLS: Your Honor?

THE COURT: Yes.

MR. FALLS: Your original judgment recommended residential drug abuse treatment program. Will that be included in both of the judgments?

THE COURT: Yes, either way it goes. The only thing I changed in the original judgment was in the alternative judgment wherein I changed the amount of tine imposed.

MR. FALLS: Thank you, Your Honor.

THE COURT: Yes. Thank you for being with us, Mr. Falls. Come back soon.

MR. FALLS: Thank you Your Honor. I'll try not to make it so complicated next time.

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FILED

MAY 30 2008

No. 07-1154

# In the Supreme Court of the United States

STEPHEN DALE MCCLELLAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the district court violated petitioner's Sixth Amendment rights by finding facts, by the preponderance of the evidence, that increased petitioner's advisory Sentencing Guidelines range.

2. Whether the court of appeals properly reviewed petitioner's sentence for reasonableness.

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# In the Supreme Court of the United States

No. 07-1154

STEPHEN DALE MCCLELLAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is not published in the *Federal Reporter* but is reprinted in 257 Fed. Appx. 654.

### JURISDICTION

The judgment of the court of appeals was entered on December 10, 2007. The petition for a writ of certiorari was filed on March 10, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Western District of North Carolina, petitioner was convicted of conspiracy to possess in excess of 1.5 kilograms of methamphetamine with the intent to distribute it, in violation of 21 U.S.C. 841 (2000 & Supp.

V 2005) and 18 U.S.C. 846. He was sentenced to 36 months of imprisonment, to be followed by three years of supervised release. Pet. App. A2, A10, A12. In an alternative judgment, petitioner was sentenced to 121 months of imprisonment, to be followed by three years of supervised release. *Id.* at A23, A25. The court of appeals remanded for resentencing in accordance with the alternative judgment. *Id.* at A1-A5.

1. Petitioner, along with six others, was charged with conspiracy to possess in excess of 1.5 kilograms of methamphetamine with the intent to distribute it, in violation of 21 U.S.C. 841 (2000 & Supp. V 2005) and 18 U.S.C. 846. Pet. App. A2. At trial, petitioner admitted that he was addicted to methamphetamine and had possessed 20 grams of the illegal drug, but he denied participating in the more extensive conspiracy that government witnesses described. C.A. App. 44-45; Pet. App. A41-A43.

A jury found petitioner guilty; it additionally found by special verdict that the conspiracy involved at least 1.5 kilograms of a substance containing methamphetamine, but that the government did not prove beyond a reasonable doubt that petitioner knew or could have reasonably foreseen that the conspiracy involved that amount. The jury was not asked to make any additional findings as to the amount of drugs attributable to petitioner. *Id.* at A33.

The Presentence Investigation Report (PSR) calculated the base offense level to be 34, based on the 1.5 kilogram drug quantity attributed to the conspiracy. With a criminal history category of I, petitioner's sentencing range under the Guidelines was 151 to 188 months of imprisonment. Pet. App. A33. The district court rejected the PSR calculations and concluded that it could sentence petitioner based only on the 20 gram

drug quantity that petitioner had admitted to possessing. Under that assumption, the base offense level was 20 and the Guidelines sentencing range was 33 to 41 months. The court sentenced petitioner to 36 months of imprisonment. *Id.* at A33-A34.

2. The government appealed and the court of appeals reversed and remanded for resentencing. It held that petitioner's sentence was unreasonable because the district court had failed to calculate the advisory Guidelines range using all methamphetamine amounts properly attributable to petitioner under the advisory Guidelines and thus had imposed sentence as the result of an incorrect application of the Guidelines. Pet. App. A35-A37 & n.*.

3. On remand, the district court entered two amended judgments. One amended judgment reimposed a sentence of 36 months of imprisonment, reflecting an advisory Guidelines range of 33 to 41 months based on the drug quantity that petitioner had admitted. In the district court's view, that was the "correct" range and a 36-month sentence was "reasonable" because a defendant could only be held responsible for a drug quantity that is found by a jury or admitted by the defendant. Pet. App. A52-A54.

The court simultaneously issued an alternative amended judgment that imposed a sentence of 121 months of imprisonment. The court explained that the alternative sentence responded to the court of appeals' "directive for the Court to make its own findings" as to the drug quantity attributable to petitioner. Pet. App. A54. Based on the evidence at trial and as contained in the PSR, the court found that petitioner "knew, understood and foresaw the involvement of the conspiracy in the amount of at least 500 grams [of methamphet-

amine]." *Ibid.* The resulting offense level of 32 produced an advisory Guidelines range of 121 to 151 months, which the court concluded "provide[d] an appropriate window for the imposition of a reasonable sentence." *Id.* at A55.

The court made clear that, in imposing the alternative sentence of 121 months of imprisonment, it had considered the factors in 18 U.S.C. 3553(a) (2000 & Supp. V 2005):

> So, there are two judgments. The first will be imposing the original judgment. The alternative judgment, if the Court [of Appeals] finds that I have the authority to find facts by a preponderance of the evidence. Having sat at the trial and reviewed the papers filed in the case, the Court, by a preponderance of the evidence determines that an appropriate amount was 500 grams and imposed the alternative judgment * * * on the basis of offense level 32, and then taking again into consideration [*United States* v.] *Booker*, [543 U.S. 220 (2005),] the fact that the Guidelines are no longer mandatory, and 3553(a).

Pet. App. A55-A56.

4. The government appealed the amended judgment imposing a sentence of 36 months of imprisonment. The court of appeals held that, under the Fourth Circuit's post-*Booker* precedent, the district court was required to make findings on drug quantity in applying the advisory Guidelines. Pet. App. A4. It reasoned that "a district court does not violate the Sixth Amendment by making factual findings as to drug quantity by a preponderance of the evidence as long as the fact-finding does not enhance the sentence beyond the maximum term specified in the substantive statute." *Ibid.* Accordingly,

it vacated the amended judgment and remanded for resentencing "in accordance with the district court's alternative amended judgment." *Ibid.* On remand, the district court resentenced petitioner to 121 months of imprisonment. 1:04-cr-0074-LHT-DLH-5 Docket entry No. 223 (W.D. N.C. Jan. 8, 2008).

**ARGUMENT**

Petitioner contends (Pet. 9-12) that the court of appeals violated his Sixth Amendment rights when it remanded with instructions to impose an alternative sentence based on judicial factual findings that increased his advisory Sentencing Guidelines range. He also contends (Pet. 12-17) that the court of appeals' review for reasonableness was inconsistent with this Court's decision in *Gall* v. *United States*, 128 S. Ct. 586 (2007), and that its remand instructing the district court to impose the alternative amended judgment denied the district court the opportunity to consider whether an out-of-Guidelines sentence was warranted in light of the factors in 18 U.S.C. 3553(a) (2000 & Supp. V 2005). Those contentions are without merit, and further review is not warranted.[1]

1. a. Petitioner was sentenced under advisory Guidelines in accordance with *United States* v. *Booker*, 543 U.S. 220 (2005). *Booker* held that any fact (other than a prior conviction) necessary to support a sentence ex-

[1] This petition for a writ of certiorari is technically interlocutory, because it seeks review of the court of appeals' remand to the district court for resentencing. Ordinarily, the interlocutory posture of a case "of itself alone furnishe[s] sufficient ground for the denial" of a petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Here, however, the scope of the remand was limited to the ministerial task of imposing the specific sentence dictated by the court of appeals.

ceeding the maximum authorized by a guilty plea or jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. *Id.* at 244. By severing provisions of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 211, 98 Stat. 1987, to make the Guidelines advisory rather than mandatory, *Booker* remedied the constitutional problem presented by mandatory federal Sentencing Guidelines: the maximum sentence authorized by the jury verdict in federal criminal cases is now the statutory maximum for the offense under the United States Code. As long as the sentence imposed does not exceed that statutory maximum, the court may constitutionally impose sentence based on facts it finds by a preponderance of the evidence. See *id.* at 233 (noting that, "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant"). Here, the maximum sentence authorized by the jury verdict was 20 years of imprisonment, see 21 U.S.C. 841(b)(1)(C) (Supp. V 2005), more than the 121 months to which petitioner was sentenced.

The Court reaffirmed in *Cunningham* v. *California*, 127 S. Ct. 856, 866 (2007), that "there was no disagreement among the Justices" that judicial fact-finding under advisory Sentencing Guidelines "would not implicate the Sixth Amendment." And, in *Rita* v. *United States*, 127 S. Ct. 2456, 2465-2466 (2007), the Court again confirmed that its "Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." See *id.* at 2467 (noting *Booker*'s recognition that fact-finding by judges does not

implicate the constitutional issues confronted in that case if the Guidelines are not "binding").

Since *Booker*, the courts of appeals have uniformly held that a sentencing judge generally may find, by a preponderance of the evidence, facts relevant to determining the advisory Guidelines range. See, *e.g.*, *United States* v. *Grier*, 475 F.3d 556, 567-568 (3d Cir.) (en banc), cert. denied, 128 S. Ct. 106 (2007); *United States* v. *Kilby*, 443 F.3d 1135, 1140 (9th Cir. 2006); *United States* v. *Garcia*, 439 F.3d 363, 369 (7th Cir. 2006); *United States* v. *Vaughn*, 430 F.3d 518, 525-527 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Yeje-Cabrera*, 430 F.3d 1, 23 (1st Cir. 2005); *United States* v. *Morris*, 429 F.3d 65, 72 (4th Cir. 2005), cert. denied, 127 S. Ct. 121 (2006); *United States* v. *Magallanez*, 408 F.3d 672, 683-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Yagar*, 404 F.3d 967, 972 (6th Cir. 2005); *United States* v. *Mares*, 402 F.3d 511, 519 & n.6 (5th Cir.), cert. denied, 546 U.S. 828 (2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 546 U.S. 940 (2005).

b. Petitioner relies on Justice Scalia's statement in *Rita* that the Court's opinion in that case does "not rule out as-applied Sixth Amendment challenges to sentences that would not have been upheld as reasonable on the facts encompassed by the jury verdict or guilty plea," Pet. 11 (quoting *Rita*, 127 S. Ct. at 2479 (Scalia, J., concurring in part and concurring in the judgment)); see *Gall*, 128 S. Ct. at 602-603 (Scalia, J., concurring). He contends that his Sixth Amendment rights were violated because his sentence "would not be mandated by the Fourth Circuit but for the existence of a judicial finding of drug quantity." Pet. 11-12. As an initial matter, the Fourth Circuit did not "mandate" a particular sentence;

rather, it determined that the district court's alternative sentence reflected a correct application of the Guidelines (taking into account the district court's own drug quantity findings) *and* a correct exercise of discretion under Section 3553(a) and *Booker*. See pp. 4-5, *infra*. The court of appeals did not decree that the quantity findings *required* a higher sentence.

In any event, for the reasons explained above, as long as the sentencing court's legal discretion extends to the maximum established by the United States Code, any such as-applied Sixth Amendment challenge must fail. And even if an as-applied challenge were available, petitioner could not establish that his 121-month sentence would be unreasonable for the drug conspiracy found by the jury. Cf. *Rita*, 127 S. Ct. at 2473 (Stevens, J., concurring). This Court has recently denied review in several cases that involved similar claims, see, *e.g.*, *Bradford* v. *United States*, 128 S. Ct. 1446 (2008); *Alexander* v. *United States*, 128 S. Ct. 1218 (2008), and the same result is warranted here, especially because petitioner did not raise an as-applied challenge to the alternative amended judgment in the court below, and the court of appeals did not address such a challenge in its opinion. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks and citation omitted).

2. a. Petitioner contends (Pet. 12-15) that the court of appeals' decision ordering entry of the alternative judgment was inconsistent with *Gall*, *supra*, because it treated the Guidelines sentence as presumptively correct and failed to assess reasonableness in light of the

Section 3553(a) factors. That argument is without merit for two reasons.

First, petitioner did not cross-appeal the alternative sentence; nor did he challenge the 121-month sentence as unreasonable in his response to the government's appeal. As a result, the court of appeals was asked neither whether the 121-month sentence was reasonable nor whether the district court adequately addressed the Section 3553(a) factors. Instead, the court of appeals considered only the question raised in the government's appeal and correctly held that the district court erred in failing to make a judicial finding of drug quantity in sentencing petitioner to 36 months of imprisonment.

Second, petitioner's reliance on *Gall* is misplaced because the alternative 121-month sentence was within, not outside, the properly calculated Guidelines range. To the extent that the court of appeals treated that Guidelines sentence as "presumptively correct," Pet. 15, this Court's decision in *Rita* establishes that an appellate court may do so consistent with the Sixth Amendment. 127 S. Ct. at 2465 ("[T]he courts of appeals' 'reasonableness' presumption * * * simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable.").

b. Finally, petitioner contends that the court of appeals "ordered the district court to impose a guideline sentence to the exclusion of all other factors." Pet. 17. The district court, however, recognized its authority to impose an out-of-Guidelines sentence and stated that it had "considered the factors noted in 18 U.S.C. § 3553(a)." Pet. App. A55. "[T]aking * * * into consideration *Booker*, the fact that the Guidelines are no lon-

ger mandatory, and 3553(a)," *id.* at A56, the district court concluded that the Guidelines range of 121-151 months "provide[d] an appropriate window for the imposition of a reasonable sentence." *Id.* at A55. See *Rita*, 127 S. Ct. 2468 ("[W]hen a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation. Circumstances may well make clear that the judge rests his decision upon the Commission's own reasoning that the Guidelines sentence is a proper sentence (in terms of § 3553(a) and other congressional mandates) in the typical case, and that the judge has found that the case before him is typical.").

The district court made clear that, if the court of appeals determined that the district court had the authority to sentence petitioner based on judicial findings of drug quantity, then the alternative sentence should be imposed. Pet. App. A55-A56 ("So, there are two judgments. The first will be imposing the original judgment. The alternative judgment, if the Court [of Appeals] finds that I have the authority to find facts by a preponderance of the evidence."). Under those circumstances, the court of appeals properly ordered the district court to resentence petitioner to the alternative sentence.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the
# Supreme Court of the United States

STEPHEN DALE MCCLELLAN,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Fourth Circuit

## REPLY TO BRIEF IN OPPOSITION

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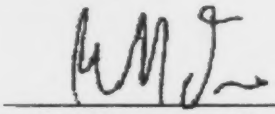
The petitioner disagrees with the government's assertion that he failed to preserve his Sixth Amendment objection to the application of the sentencing guidelines in the district court's alternative sentence of 121 months. While it is true the petitioner did not use the phrase "as applied" in the Court of Appeals, it is likewise correct that he challenged the manner in which the advisory guidelines were applied to him in the alternative amended judgment. The petitioner did this in two ways.

First, petitioner argued that under then-prevailing Fourth Circuit precedent, "a guidelines sentence containing judge-based sentencing enhancements is unconstitutional." Petitioner cited holdings from *United States v. Johnson*, 445 F.3d 339, 344 (4th Cir. 2006), *United States v. Moreland*, 437 F. 3d 424, 434 (4th Cir.), *cert. denied* 126 S. Ct. 2054 (2006), *United States v. Perez-Pena*, 453 F.3d 236 (4th Cir.), *cert. denied*, 127 S. Ct. 542 (2006), and *United States v. Hampton*, 441 F.3d 284, 288 (4th Cir. 2006) to illustrate the mandatory nature of advisory guidelines under then-existing precedent. Thus, petitioner did challenge the manner in which the advisory guidelines had been applied to him on Sixth Amendment grounds. He did so in the context of then-existing Fourth Circuit precedent. Pet. Reply App. 1-2.

Second, petitioner argued that the district court's drug quantity determination violated his Sixth Amendment rights because the jury which convicted Mr. McClellan made no such finding. Pet. Reply App. 3-4. In short, petitioner's Sixth

Amendment claim, and his challenge to the guidelines, was presented to the Court of Appeals.

Respectfully submitted,



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## ARGUMENT

### I. THE DISTRICT COURT CORRECTLY APPLIED THE LAW WHEN IT SENTENCED MCCLELLAN TO A TERM OF IMPRISONMENT BASED ON WHAT MCCLELLAN ADMITTED AT TRIAL.

#### a. The district court correctly determined it was limited to McClellan's testimony.

Under the Sixth Amendment, a defendant charged with conspiracy is entitled to a jury determination of the quantity of drugs attributable to him as an individual rather than the quantity for which the conspiracy as a whole was responsible. *United States* v. *Smith*, 441 F.3d 254, 273 (4th Cir. 2006). In McClellan's case, the jury found in a special verdict that the conspiracy involved at least 1.5 kilograms of methamphetamine, but that McClellan could not reasonably foresee that amount. *(Id.* at 14-15). No lesser quantity was submitted for the jury's consideration, and, thus, no specific quantity foreseeable to McClellan was found beyond a reasonable doubt.

At McClellan's first sentencing hearing, the district court concluded that McClellan could only be sentenced for the quantity of drugs to which he admitted involvement in his testimony during the trial because of the jury's special verdict, and because the amounts in the presentence report were not foreseeable to McClellan. *(Id.* at 80). At re-sentencing, the district court ruled that its original

sentencing analysis comported with *Booker*, and thereafter re-imposed the same sentence of 36 months imprisonment. *Id.* at 80-84, 90.

The government appeals the sentence on the ground that the district court's decision to limit its calculation of drug quantity to only what McClellan admitted conflicts with Fourth Circuit precedent and the mandate of the Court in *United States v. McClellan*, 182 Fed.Appx. 224 (4th Cir. 2006). McClellan disagrees. *Booker* holds that any fact other than the fact of a prior conviction which exposes a defendant to increased penalties must either be admitted by the defendant or submitted to a jury and proved beyond a reasonable doubt. Because there was no jury finding on drug quantity, the district court correctly ruled that it was constrained at sentencing by the drug quantity admitted by McClellan.

b. **The sentence was correct because the district court was precluded from making a drug amount finding of 50 grams or more of methamphetamine.**

In its Brief, the government urges this Court to adopt the district court's alternative sentencing judgment, based on the district court's finding by a preponderance of the evidence, that the offense involved at least 500 grams of methamphetamine. (Appellant's Brief, p. 6, 7, 10, 11). McClellan contends that the district court was precluded from making any determination on its own that the offense involved 50 grams or more of methamphetamine.

The Supreme Court "has repeatedly held that, under the Sixth Amendment, any fact that *exposes* a defendant to a greater potential sentence must be found by a

* * *

546. Finally, if the court imposes a "variance" sentence outside the Guidelines range, it must explain its reasons for doing so. *Id.* By requiring district courts to justify variance sentences outside the guidelines, the Fourth Circuit has created a burden of persuasion *in the district court* where the Supreme Court has now expressly stated there is none. For example, this Court has restricted district courts' sentencing discretion by limiting both departures and variances from the Sentencing Guidelines to situations in which "[the Guidelines] range does not accurately capture the particular circumstances of an individual defendant." *See United States* v. *Johnson,* 445 F.3d 339,344 (4th Cir. 2006). In *United States* v. *Moreland,* this Court held that "[t]he farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be." 437 F.3d 424, 434 (4th Cir.), *cert. denied,* 126 S. Ct. 2054 (2006). In *United States* v. *Perez-Pena,* 453 F.3d 236 (4th Cir.), *cert. denied,* 127 S. Ct. 542 (2006), this Court made it clear that a sentence outside the Guidelines range was presumed to be unreasonable, holding that the district court could not sentence outside the Guideline range unless the defendant could demonstrate that he "was significantly more deserving of a lower sentence than the typical defendant whose illegal reentry crime has produced

the 37-46 month guideline range." *Id.* at 245. In *United States* v. *Hampton,* this Court held that, to withstand reasonableness scrutiny, the district court's justification for varying from the Guidelines sentence may not give "excessive weight" to any single sentencing factor. 441 F.3d 284, 288 (4th Cir. 2006). These holdings clearly indicate that the Fourth Circuit has given primacy to the sentencing guidelines above all other sentencing factors in §3553(a).

**d. If the guidelines are mandatory, sentencing enhancements must be submitted to a jury and proved beyond a reasonable doubt.**

Creating a sentencing system that places an extraordinary burden of proof on defendants and district court judges to justify non-guidelines sentences is functionally no different than the mandatory guidelines system proscribed by *Booker*. *Pre-Booker,* pursuant to 18 U.S.C. § 3553(b), a departure from the guidelines had to be justified by the existence of facts that made the case sufficiently atypical. *Booker* found §3553(b) unconstitutional and excised it from the statute, but current Fourth Circuit practice basically brings it right back. Defendants have a burden to establish why a non-guidelines sentence is appropriate, and district court judges must justify on the record why a sentence outside the guidelines is reasonable. This is virtually the same sentencing structure that was in place under the old §3553(b). Because of this, a guidelines sentence in the Fourth Circuit containing judge-based sentencing enhancements is

unconstitutional. Therefore, the district court did not err when it declined to follow the mandate of this Court's panel opinion. *See McClellan, supra.*